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Supreme Court, U.S.
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No. 10-75

IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

FRANCIS BATTAGLIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Sixth Appellate District

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF

In its petition, Conrail showed that there is a deep and persistent conflict among the federal appellate courts and state high courts as to the standard for causation under the Federal Employers' Liability Act ("FELA"). Pet. 14-22. Conrail explained that Justices of this Court had recognized that conflict in *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007), and that this case directly implicates that conflict because the grant and affirmance of summary judgment was predicated upon the application of a lower standard of causation based on language from *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500, 508 (1957). Pet. 22-24. Conrail also showed that review should be granted as to the second question because the decision below conflicts with this Court's decisions setting forth the deference that courts owe to an agency's interpretation of its regulations. *Id.* at 28-31.

Respondent's Opposition ("Opp.") does not undermine these conclusions. As to causation under FELA, respondent acknowledges a conflict among the lower courts. Opp. 20 ("Two state court decisions cited by Conrail appear to read *Rogers* more narrowly than the federal courts of appeals."). That conflict is not a "mere semantic discrepancy." *Id.* at 19. Rather, this Court has acknowledged the "signify-can[ce]" of the "substantive content of the causation standard" under FELA, *Sorrell*, 549 U.S. at 165, and respondent has no response to Conrail's showing that the "even the slightest" standard will be outcome determinative in a wide-array of FELA cases. Pet. 22-24.

Contrary to respondent's scattershot argument (Opp. 6-14), this case is an appropriate vehicle to resolve that conflict. The trial court granted

summary judgment under a "relaxed" standard of causation because it concluded that respondent showed that his exposure to diesel fumes "contributed to any degree, even the slightest, to Plaintiff's asthma." Pet. App. 32a. That ruling was affirmed by the court of appeals, which was presented and passed on the proper standard for causation under FELA. *Id.* at 11a As a result, adoption of a "proximate cause" standard by this Court, at a minimum, would require vacatur of the judgment below.

Finally, as to the second question presented, respondent cannot avoid the conclusion that the courts below improperly disregarded the Federal Railroad Administration's ("FRA's") interpretation of the relevant safety regulation. That disregard conflicts with this Court's decisions and warrants review. If left uncorrected, the decision below would impose an impossible burden on railroads to make their locomotives "airtight" without regard to whether levels of diesel exhaust are even sufficient to cause injury to a railroad's employees.

The petition for writ of certiorari should be granted.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT OVER THE STANDARD FOR CAUSATION UNDER FELA.

1. Respondent's argument that this case is an inappropriate vehicle is meritless. Opp. 6-14.

Conrail timely raised its challenge below. In its opening brief to the court of appeals, Petitioner explained that the "trial court's reliance on" the "'contributed to any degree, even the slightest'"

standard "was misplaced." Conrail Br. at 15.[1] Battaglia responded that, under FELA, "a railroad is liable to an injured employee if the railroad's 'negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" Brief of Appellee, Francis Battaglia at 19, *Battaglia* v. *Consol. Rail Corp.*, No. L-08-1332 (Ohio Ct. App. Mar. 4, 2009) (quoting *Rogers*, 352 U.S. at 506). In reply, Conrail again challenged the standard set forth in *Rogers*, explaining that, under FELA, a plaintiff instead "must prove that 'negligence was the proximate cause in whole or in part' of the employee's injury," Conrail's Reply at 4-5 (quoting *Tennant* v. *Peoria & Perkin Union Ry.*, 321 U.S. 29, 32 (1944)), and that "the Supreme Court has emphasized that the requirement of proximate causation must still be met," *id.* (citing *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 423 (1949)).[2]

Further, Conrail's challenge is squarely before the Court because "[t]here can be no question as to the proper presentation of a federal question when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436-37 (1959); *accord* Stern & Gressman et al., *Supreme Court Practice* § 3.19, at 185 (8th ed.

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[1] Conrail referenced *Aparicio* v. *Norfolk & W. Ry.*, 84 F.3d 803, 808 (6th Cir. 1996), which was cited by the trial court for the "even the slightest" standard for causation. Pet. App. 32a. *Aparicio* took the "even the slightest" language from *Rogers*. 84 F.3d at 807-09.

[2] In opposing summary judgment on respondent's FELA claim, Conrail argued that plaintiff "must still demonstrate some negligence and proximate cause." Conrail's Opposition to Plaintiffs' Motion for Summary Judgment on Count One (FELA) at 6. Conrail highlighted that plaintiff's expert had previously concluded that respondent suffered from "asbestosis" but had *not* diagnosed him with the asthma for which he obtained $2.6 million in damages. Opposition to Summary Judgment, Ex. C.

2002). Here, the Ohio court of appeals held that, under FELA, "[a]n injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages." Pet. App. 11a (citing *Rogers*, 352 U.S. at 508; *Aparicio*, 84 F.3d at 808). Applying that legal standard, the court of appeals affirmed the trial court's conclusion that summary judgment was warranted because exposure to diesel exhaust "contributed to any degree, even the slightest, to plaintiff's asthma." *Id.* at 32a (citing *Aparicio*, 84 F.3d at 803). The court of appeals passed on the proper standard for showing causation under FELA.

Finally, contrary to his argument, the "difference between 'even the slightest' causation and so-called 'proximate cause'" was a critical issue below. Opp. 9. Respondent argued in his summary judgment motion that under the relaxed FELA standard he need not "prove that exposure to diesel exhaust *was* the proximate cause of [his] asthma" but only that "exposure to diesel exhaust was *a* contributing cause, at least in some small way, of Mr. Battaglia's asthma." Motion for Summary Judgment at 13. This issue was essential because respondent admitted that it was "very possible that there were other causes that *also* contributed to his asthma" but they were irrelevant under FELA's "*contributed to any* degree, even the slightest" causation standard. *Id.* at 12, 13.[3]

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[3] Respondent's expert's report suggested other causes, *e.g.*, respondent's respiratory problems also were "associated with his [exposure to] asbestos," which was unrelated to exposure to diesel exhaust. Motion for Summary Judgment, Ex. B. to Affidavit Dr. Kelly at 2. Moreover, an expert's opinion would not compel judgment on an issue where plaintiff bears the burden of proof because "'it is for the jury to decide whether any,

As such, this case is an ideal vehicle for resolving this conflict because a favorable ruling from this Court would require vacatur of the judgment below to allow reconsideration of the record under the appropriate "proximate cause" standard. See *Sorrell*, 549 U.S. at 172.[4]

2. Respondent does not and cannot dispute that there is a conflict among the federal appellate courts and state courts of last resort over the standard for causation under FELA. For example, in *Marazzato* v. *Burlington Northern Railroad*, 817 P.2d 672 (Mont. 1991), the court held that *Rogers* did not do away with the requirement that a plaintiff must show that "defendant's negligence was the proximate cause in whole or in part" of the claimed injury. *Id.* at 675. Likewise, the Utah Supreme Court, relying upon this Court's decision in *Sorrell*, held that *Rogers* did not eliminate the "proximate cause requirement" in FELA actions. *Raab* v. *Utah Ry.*, 221 P.3d 219, 230 (Utah 2009). Given these rulings, respondent admits that "[t]wo state court decisions cited by Conrail

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and if any what, weight is to be given to the [expert's] testimony'" and that is so "'even if such testimony [is] uncontradicted.'" *Sartor* v. *Ark. Gas Corp.*, 321 U.S. 620, 627 (1944) (Jackson, J.).

[4] Respondent seeks to distinguish *Rhodes* v. *Firestone Tire & Rubber Co.*, No. 08AP-314, 2008 WL 4368480, at *3-4 (Ohio Ct. App. Sept. 25, 2008), arguing that it turned on the expert's failure to opine with a "'reasonable degree of engineering probability.'" Opp. 8 n.5. In *Rhodes*, the court ruled that the expert did not satisfy traditional proximate cause because he identified the alleged defect as one of three "'possible' causes." 2008 WL 4368480, at *3-4 Here, respondent admitted that it was "very possible" that there were other "other causes" of his asthma, but argued they were irrelevant under the "relaxed standard of causation under the FELA." Motion for Summary Judgment at 12, 13.

appear to read *Rogers* more narrowly than the federal courts of appeals." Opp. 20. See *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring) (recognizing division of authority).

Respondent argues review should be denied because the conflict involves only a "handful of state supreme courts" and "the 'semantic difference' between the handful of state supreme courts opinions . . . has not led to conflicting results." Opp. 19. Resolution of conflicts between federal courts of appeals and state high courts is a principal reason for granting certiorari. Sup. Ct. R. 10(b). Moreover, resolution of that conflict is critical here because state and federal courts exercise concurrent jurisdiction over FELA. *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949); see also 45 U.S.C. § 56. Therefore, state and federal courts in the same state currently are applying conflicting legal standards on a core element of an important federal statute. Compare *Raab*, 221 P.3d at 229 (Utah), with *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997); compare *Marazzato*, 817 P.2d at 675 (Mont.), with *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993).

Nor can this conflict be dismissed as a "mere semantic discrepancy." Opp. 19-20. In *Sorrell*, the full Court explained that the issue of "the substantive content of the causation standard" under FELA was "significant," 549 U.S. at 165, and four Justices wrote or joined separate opinions highlighting the conflict among the courts on this issue and expressing their views on whether *Rogers* "smuggled proximate cause out of the concept of defendant liability under FELA." *Id.* at 173 n* (Souter, J., concurring); see *id.* at 177 (Ginsburg, J., concurring in judgment).

The conclusion that the substantive standard for assessing causation is an important issue is

inescapable. Indeed, allowing a plaintiff to argue to a court or to a jury that the defendant is liable if its negligence "played any part, even the slightest" in causing an injury will have a concrete impact on the resolution of virtually every case under FELA. 5 Sand et al., *Modern Federal Jury Instructions—Civil* ¶ 89.02, at 89-44 (3d ed. 2006); see also Br. of Ass'n of American Railroads as *Amicus Curiae* at 6-11 ("AAR Br.") (explaining that causation standard for FELA claims will have "substantial and decisive impact").

Moreover, on this point, the suggestion that the conflicting legal standards do not lead "to conflicting results" is demonstrably wrong. Opp. 19. Conrail previously highlighted that the Second Circuit has held that the standard for causation has a concrete impact on the resolution of FELA cases. Pet. 22 (discussing *Syverson* v. *Consol. Rail Corp.*, 19 F.3d 824, 825-28 (2d Cir. 1994)). In *Syverson*, the court of appeals acknowledged that the trial court's grant of summary judgment "would have been quite appropriate had this been a negligence action," 19 F.3d at 828, but it reversed because the standards for causation "normally applied in summary judgment are substantially diluted" under FELA, *id.* at 825. Respondent has no response to this holding or the broader point that "the proper standard for showing causation, whether reflected in jury instructions, rulings on dispositive motions (as in this case), or appellate review, surely can affect the outcome of a FELA case." AAR Br. 7-8.

3. Finally, respondent argues that review should be denied because "on the merits," the court below applied the proper legal standard. Opp. 22-25. That argument is wrong, and, in all events, provides no basis for denying review in this case.

On the merits, respondent argues that FELA should not be interpreted as "requiring strict adherence to traditional proximate cause" and instead should be read as adopting a "relaxed" causation standard that "shift[s] financial responsibility for injured railroad workers . . . to the railroads." Opp. 22, 24. As this Court explained in *Sorrell*, "FELA was indeed enacted to benefit railroad employees, ... [but] [i]t does not follow . . . that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees." *Sorrell*, 549 U.S. at 171. Instead, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Id.* at 165-66 (citing *Urie*, 337 U.S. at 182). And, "the prevailing view when FELA was enacted in 1908" was that in a negligence action, "'the defendant's negligence must have been a proximate cause in order to give any right of action.'" *Id.* at 166-67 (quoting 1 T. Shearman & A. Redfield, *Law of Negligence* § 94, at 143-44 (5th ed. 1898)).

Although FELA provides that a railroad is liable for injury "resulting in whole or in part from the negligence" of defendant, 45 U.S.C. § 51, this statutory language says nothing "about the familiar proximate-cause standard for claims . . . of a defendant-employer's negligence." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). Likewise, as explained by Justice Souter, the Court's cases "throughout the half-century between FELA's enactment and the decision in *Rogers* . . . consistently recognized . . . proximate cause as the proper standard in FELA suits." *Id.* As such, "*Rogers* left the law where it was." *Id.*

To be sure, this view has not garnered unanimous support. Justice Ginsburg appears to have embraced

a different view of FELA, concluding that *Rogers* sets forth the test for "proximate causation applicable in FELA suits." 549 U.S. at 178 (Ginsburg, J., concurring in judgment). And, as respondent notes, cases from this Court decided since *Rogers* have been read by the lower courts for the proposition that FELA does not require a showing of proximate causation. But, as the Utah Supreme Court has ruled, "the Court's recent opinion in [*Sorrell*] strongly indicates that the [Supreme] Court has never squarely addressed the issue of *Roger's* impact on proximate cause." 221 P.3d at 228 (footnote omitted).

Respondent's views on the merits highlight the conflict among the lower federal courts. Review should be granted to resolve that conflict.

II. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES REGARDING THE DEFERENCE DUE TO AN AGENCY'S INTERPRETATION OF ITS REGULATIONS.

The decision below also conflicts with this Court's decisions regarding the deference due to an agency's interpretation of its regulations. Pet. 28-31.

Respondent does not dispute that an agency's interpretation of its own regulations must "be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). Under the regulation at issue, the FRA has concluded that allowing properly vented exhaust to migrate into the locomotive cab only violates the regulation if the exhaust exceeds

OSHA's exposure thresholds. Pet. 29.[5] The court below, Pet. App. 10a, did not dispute that this is FRA's position, nor did it assess whether FRA's interpretation was "plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512 (internal quotation marks omitted).[6] As a result, under this Court's cases, the court of appeals should have deferred to the agency's interpretation.

Respondent disagrees, arguing that the court below did not "disregard Supreme Court precedent on deference to agency construction of a regulation" but instead rejected "a purported administrative construction that conflicts with the regulation's unambiguous terms." Opp. 27. That reading of the ruling below is unpersuasive. The court of appeals did not conclude that FRA's interpretation of its regulation was impermissible, but instead concluded that its own interpretation of the "plain language" of the regulation "*is more persuasive.*" Pet. App. 10a (emphasis added). It is, however, the agency's role to decide "which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512.

Nor can the adverse impact of that ruling be dismissed. The decision below requires railroads to ensure that locomotive cabs are "airtight" because "if

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[5] The FRA's interpretation of § 229.43 properly takes into account exposure to diesel exhaust levels deemed "toxic" by OSHA while recognizing that railroads simply cannot, in all circumstances, "prevent the entry of some fumes into the cab." 45 Fed. Reg. 21,092, 21,098 (Mar. 31, 1980).

[6] Respondent's claim (Opp. 28) that the "administrative construction on which Conrail relies (a report to Congress) is not one that is entitled to deference" is mistaken. *E.g. Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945) (deferring to an agency's review reflected in congressional report).

during normal operation exhaust enters the cab, the rule is violated." Pet. App. 11a. Respondent argues that "[a] single intermediate state court ruling is an exceedingly slender basis for Conrail's predictions of the tremendous difficulties it sees in application of the plain language of the regulation." Opp. 29. But, as explained by *amicus* AAR, the refusal to defer to FRA's interpretation "has the effect of potentially rendering every locomotive used by railroads to be in violation of federal law." AAR Br. 21-22.

Finally, and somewhat ironically, respondent argues that the ruling's impact is tempered by the fact that a plaintiff must prove actual causation. Opp. 29-30. Under respondent's view of FELA, however, that is cold comfort because a plaintiff would need not prove proximate cause but instead could establish liability based solely on evidence that diesel exhaust "*contributed to any degree*, even the slightest, to [plaintiff's alleged injury]." Plaintiff's Motion for Summary Judgment at 12.

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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